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In the Supreme Court
of the United States

October Term, 1945

No.....

B. T. WALLER,

Petitioner,

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, B. T. Waller, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action for damages under the Federal Employers' Liability Act as amended by Section 1, Chapter 865, Act of August 1, 1939 (45 U.S.C.A. 51) by petitioner against respondent for personal injuries sustained around midnight Dec. 14, 1942, during dark-

ness in its yards at Portland, Oregon, while employed as engine foreman in carrying on switching operations with the use of a locomotive engine. Engine was manned with an engineer and fireman, and switching crew in charge of petitioner as foreman, who had two switchmen helpers; that tracks 83 and 84 extend in a northerly and southerly direction (T. of T. 23); that respondent had about sixteen cars coupled together on track 84, two of which were to be cut off the south end thereof and the remaining string of cars moved by engine attached thereto, in a northerly direction off said track; that the cars were approximately 40 feet in length (T. of T. 24) (not over 575 feet in all); that in the furtherance of the switching movement petitioner walked slowly south between tracks 83 and 84 on the ground area (T. of T. 173-176) which was used by switchmen as a footpath in getting on and off cars (T. of T. 42, 43) and was on the west side of said cars; that fieldman Mayfield had walked back ahead of him between tracks 83 and 84 to cut off and leave the two rear cars there (T. of T. 25, 83-85); that after Mayfield had pulled the pin to cut the cars off he gave a backup signal with his lighted lantern which petitioner repeated to the engineer or Williams, head switchman, (T. of T. 25, 26, 173-176) and in response thereto the cars were moved by the locomotive in a northerly direction on said track; that petitioner kept moving toward the rear end of the string intending to board the same close to the rear end; that in the performance of his duties he looked for brakes sticking on the cars as they

passed by him from 7 to 10 miles per hour (T. of T. 27, 177, 185); that as the cars were passing he attempted to board them near the rear end; that he took hold of a grab iron on the south end of a box-card which was about four feet from the following car, and attempted to step into the foot stirrup thereof (T. of T. 178, 179) and that in so doing he lost his footing where the ground area was slippery and muddy (T. of T. 34, 35, 182-185) and where there were sticks and debris strewn thereon (T. of T. 34, 35) when he stepped on one of the sticks with his left foot, which slipped and rolled under his foot and was thereby caused to miss the foot stirrup and swung backwards between the moving cars and thrown down upon the track and his right arm went over the rail and the wheels of the moving cars passed over it (T. of T. 178-180, 185, 186, 265, 266) crushing and mangling it resulting in amputation about four inches below his shoulder causing him pain (T. of T. 190, 191); and he also sustaned an injury to his shin and other bruises and shock to his nervous system.

Testimony was received which was undisputed by respondent, that the following rule of its Book of Rules was in full force and effect prior to and at the time petitioner was injured (T. of T. 186, 187):

> "Rule 709. Railroad premises must be kept in neat, clean and orderly condition."

The evidence adduced by petitioner heretofore and later referred to showed that the proximate cause of ptitioner's injury was the negligence of defendant.

The following particulars were alleged in plaintiff's complaint:

(a) that the defendant carelessly and negligently maintained the aforesaid footpath and ground area along said tracks where plaintiff was working, in a slick, slippery and muddy condition and maintained and permitted certain quantities of water to accumulate in depressions in said ground area, and carelessly and negligently caused and permitted certain debris and wooden sticks to be strung along and upon said ground area which plaintiff was required to use in boarding said cars; that such dangerous and defective condition thereof was known to the defendant or could have been known by the exercise of reasonable care and diligence, but was unknown to plaintiff, and that defendant thereby failed and neglected to provide plaintiff with reasonably safe footing and a reasonably safe place to work;

(b) that defendant carelessly and negligently failed and neglected to warn plaintiff of the aforesaid dangerous condition of said yards and ground area between the tracks upon which it required plaintiff to work in the performance of his duties, prior to the time he was injured as aforesaid;

(c) that defendant carelessly and negligently failed and neglected in the manner aforesaid to keep its said premises where the accident to plaintiff happened in a clean condition, in violation of its rule reading as follows: "Rule 709. Railroad premises must be kept in neat, clean and orderly condition."

In further support of respondent's negligence as alleged, petitioner testified, which testimony was undisputed, that he had received no notice or warning

from respondent or any of its officials, or anyone at all, prior to the time he lost his footing and was injured, of the danger entailed in stepping on sticks where it was slippery in boarding cars moving 7 or 8 miles per hour (T. of T. 186).

It will be observed from Plaintiff's Exhibits 1 and 2 admitted in evidence, which are maps of defendant's tracks in question and the testimony of witness Humble (T. of T. 346-348) shows by scale on Plaintiff's Exhibit 1 that the entire length of track 84 is approximately 463 feet as the same only extends from its switch according to the testimony of witness, to what is called the fire wall which is located where marked on Plaintiff's Exhibit 1 by small checks. The engine attached to the north end of the 14 cars preparatory to being moved was standing around switch 81 or 82 from one to two car lengths, or 40 to 80 feet, north of the switch leading to track 84 (T. of T. 24). This left from 12 to 13 cars of the string standing on track 84, a distance which could not exceed 460 feet as contra-distinguished from statement in the Supreme Court opinion (R. p. 82) that a portion of plaintiff's testimony is limited to a strip a thousand or more feet in length between tracks 83 and 84.

Petitioner further testified with reference to actual and constructive notice respondent had on the condition of the area between tracks 83 and 84 where the accident happened, that the ground area where he attempted to board the cars was slippery; that he did not recall seeing any accumulation of water there

that night; that prior to that time he had seen water standing there and that he had worked there from December 2nd on—that the amount of accumulation of water would depend on the rainfall; that during the same period of time he had seen mud in the vicinity where he was attempting to get on; that when he walked down where he attempted to get on he had seen mud there that was slippery (T. of T. 183-185); that on the afternoon of December 14th when petitioner went to work he wore a pair of striped overalls, jacket and gray sweatshirt and work shirt and they were clean (T. of T. 327, 328); that following the accident his clothes were soiled and had mud on them (T. of T. 32, 285, 328, 329); that prior to December 2nd he had worked extra and between tracks 83 and 84 he had seen sticks and debris of various sizes from half an inch to two inches that came out of cars that were unloaded; that at times between December 2nd up to the time of the accident the tracks would be more clean than at other times (T. of T. 187-189); that petitioner based his conclusion that it was a stick that he slipped on because he had seen sticks and blocks down in there the day before he was injured and some that night (T. of T. 272).

Witness Mayfield testified that he had worked on the ground area between tracks 83 and 84 on the night of the accident and on each evening about three weeks prior to the accident (T. of T. 32, 33) and that during such time there were stakes thrown out of cars and all kinds of rubbish; that the ballast be-

tween such tracks was common dirt or sand and that when it rained water accumulated there; that on the night of the accident it was raining before it occurred and that he had walked down between tracks 83 and 84 to the rear of the train; that there was some debris and sticks in there (T. of T. 34); that on the night of the accident the sticks he saw were of different sizes which he estimated they would be an inch thick, some shingles and thinner boards probably half an inch thick; that he observed the same condition prior to the accident (T. of T. 35-37); that he had seen sticks thrown out of cars by employes working for the railroad (T. of T. 38); that he had noticed sticks and debris between tracks 83 and 84 all the time he had worked there (T. of T. 40); that at times they would be cleaned up; that he worked intermittently in the yards ever since December, 1942; that he never saw any trucks back in tracks 83 or 84 or down into the yard; that between tracks 83 and 84 the ground area is used to walk on to get on and off cars; that all switchmen use it and that it is in good condition when it is free from debris (T. of T. 41-44); that he had seen debris between tracks 83 and 84 the night before the accident (T. of T. 108).

Tony Bozich, respondent's witness, a track walker, testified it was his duty every morning to walk along the tracks for the purpose of finding anything dangerous and that on December 15th after the accident, he inspected between tracks 83 and 84 and found plaintiff's glasses about 200 feet back from the switch

points (T. of T. 495-497) and that they were dirty and that at the same place about a foot to a foot and a half from the rail he found splinters of wood from one and a half to three-fourths of an inch thick and eight or ten inches long (T. of T. 498)—there were three or four of them which he thought were located where petitioner's body was dragged, bringing them to a bunch and if the bunch wasn't there, there would be one every two or three feet (T. of T. 505); that at other times he did find sticks between the above tracks and that it was his duty to pick them up and keep the place clean (T. of T. 509).

Witness Humble, respondent's Trainmaster and Asst. General Manager, testified that it rained during the day or evening prior to the accident and that it does get slippery between tracks 83 and 84 and other tracks after it rains (T. of T. 377, 378) and that the Atlas Forwarding Company, Acme Company, Union Pacific Company and other companies obtain and unload freight at the Union Pacific warehouse and that they are agents of respondent; that the trucks used in connection therewith do not back down into the yard (T. of T. 360, 361); that it was the duty of respondent's section crews to keep the yard free and clean from debris, sticks and stones and that the proper condition for footing between the tracks where switchmen getting on and alighting from cars is that it be even and smooth to afford good footing for them (T. of T. 359, 360).

Respondent's answer admitted its corporate entity; that it owned and operated railroad yards in Portland; that the ground area between certain of its tracks was used by its employes as a footpath in boarding moving cars and that when in normal condition it affords reasonably safe footing for them; admitted petitioner's employment and that he was engaged in switching operations; that at the time it was dark and that he sustained injures to his right arm necessitating partial amputation.

Respondent denied it was negligent and alleged as a defense that petitioner was negligent in boarding the cars at their rate of speed and in attempting to board or alight therefrom while under the influence of intoxicating liquor, in violation of its rule, and that his injuries resulted from such negligence (R. pp. 12, 13) and offered some evidence which it claimed showed it was not negligent and that petitioner was negligent. The evidence offered by respondent was negative in character and on the question of petitioner's alleged intoxication respondent's evidence consisted of an opinion given by Dr. Beeman on a chemical analysis of blood which respondent claimed was taken from petitioner's arm following his injury, to the effect that such blood showed 15/100s per cent alcohol (T. of T. 440). Testimony showed the chemical analysis of such blood was made when it was 36 hours old. Undisputed testimony showed that the blood if taken from petitioner's arm was without his knowledge or consent (T. of T. 606). In dispute of

such testimony Dr. Smith, petitioner's witness, claimed he did not believe such alcoholic content could be determined with blood that old (T. of T. 560, 561) as same would deteriorate after that length of time. With the exception of some 4% alcoholic content beer (T. of T. 445) which plaintiff had about 3:00 o'clock in the afternoon a half hour before he went on duty, and may have had another glass of beer with his supper at 9:30 o'clock P. M. while off duty (T. of T. 72, 241-244), his testimony was to the effect that he had no other intoxicating liquor whatsoever and none while on duty (T. of T. 240) that he was sober.

His co-employes who worked with him from 3:30 o'clock at different intervals up to the time he was injured, about 9 hours later, namedly A. J. Jack, assistant yardmaster under whom petitioner worked (T. of T. 580-585, 589), D. F. Garner, switchman (T. of T. 281-287), Jesse L. Mayfield, switchman (T. of T. 546, 555), L. M. Wray, engine foreman (T. of T. 591-594), and A. W. Lightbody, switch foreman (T. of T. 601, 602), testified that petitioner was sober and was not intoxicated.

Respondent admitted interstate commerce was being moved at the time of the accident to petitioner (T. of T. 46).

The case was tried in the Circuit Court of the State of Oregon for the County of Multnomah under the Federal Employers' Liability Act, parts of which applicable to the instant case are as follows:

(a)

Liability for Injuries to Employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * *."

Section 51, Chapter 2, Title 45, U.S.C.A.

(b)

Contributory Negligence

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; * * *."

Section 53, Chapter 2, Title 45, U.S.C.A.

The jury returned a verdict in favor of petitioner for $25,000.00 on which judgment was entered on the 16th day of June, 1944, for such amount (R. pp. 18-20).

Motion for judgment *non obstante verdicto* and motion for new trial were denied by the Circuit Court on the 7th day of August, 1944 (R. pp. 27, 28).

Respondent appealed to the Supreme Court of the State of Oregon which in a judgment dated February 26, 1946, reversed petitioner's judgment and ordered the cause remanded to the Circuit Court with directions to enter judgment for respondent (R. p. 103). (See opinion of Court, (R. pp. 73-102) Vol. 42 O.A.S. No. 6, page 215, 166 Pac. (2d) p. 488).

Petition for rehearing was denied March 27, 1946 (R. p. 104) making the judgment of the Supreme Court of the State of Oregon, which is the State Court of the last resort, final.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), as amended, 28 U.S.C.A. Sec. 344, and the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, et. seq., applicable parts of which have been heretofore quoted and petitioner claims that under such Act his rights have been denied by the Supreme Court of the State of Oregon and that its decision is in conflict therewith and with applicable decisions of this Court and decisions of other Federal Courts.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Oregon Supreme Court in this cause erred as hereinafter enumerated:

1. In holding that no substantial evidence was adduced at the trial of this cause in the Circuit Court to warrant the submission to the jury the issue of whether the negligence of defendant-respondent in one or more of the following respects proximately caused in whole or in part the injuries to petitioner: (a) in maintaining a footpath in a slick, slippery and muddy condition; (b) permitting debris and wooden sticks to be strung along and upon the ground area thereof used by petitioner in boarding moving cars; (c) failing to provide petitioner with reasonably safe footing and place to work; (d) neglecting to warn petitioner prior to injury, of aforesaid dangerous condition of said ground area and footpath; and (e) failing to keep its premises and footpath in a clean condition as provided by its Rule 709 "Railroad premises must be kept in neat, clean and orderly condition."

2. In holding that the allegation of the complaint concerning the slippery and muddy condition and the accumulation of water may be disregarded as the evidence showed that the only mud was at the switch which was about 200 feet from the scene of the accident and that the only claim of petitioner as to the cause of his slipping was based upon his inference that he stepped upon a stick which he did not see.

3. In holding that the failure to warn petitioner concerning the conditions in the yard was not shown to have any proximate relation to the accident.

4. In failing to consider Rule 709 reading "Railroad premises must be kept in neat, clean and orderly condition" and the evidence showing that the premises where petitioner was required to work were strewn with debris and sticks and that in violation of such rule same

was not kept in a clean and orderly condition (T. of T. 32-35, 40), and the fact that a railroad company rule under the Federal decisions furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence.

5. In holding that the character and size of the object on which petitioner testified he slipped was left to speculation.

6. In holding that if petitioner slipped by stepping on a stick, that there was not a scintilla of evidence to indicate how long the stick had been there, and in speculating that it may have fallen from the train which petitioner was boarding.

7. In holding that there was not a scintilla of evidence that respondent's Terminal Company ever placed or caused to fall into the yard any sticks or debris.

8. In holding that there is no testimony that any sticks or debris ever remained in the yards for any time longer than the period from the end of one day's inspection to the end of the next day's inspection.

9. In holding that the duty of respondent under the Federal Employers' Liability Act is the same as the duty of a proprietor to *invited guests* or the duty owed by the owner of land to persons employed or *invited* thereon.

10. In holding that respondent was not charged with constructive notice that there was any stick on the ground where petitioner slipped for there was no evidence as to how long the stick, if any, had been there, and further that there was no evidence that respondent caused any dangerous condition in any part of the yard. In connection, however, with this hold-

ing the Court concedes the fact that there is some evidence that sticks and debris were frequently dropped in the yard by third parties prior to the time of the accident, and further concedes that if the evidence had disclosed that debris had been strewn generally about the area where the accident occurred and if the respondent had negligently allowed it to remain there with notice of its existence, then the respondent's knowledge of the general condition prevailing would have been sufficient to support a verdict for petitioner even though respondent did not know of the particular stick on which petitioner slipped.

11. In holding that there was no room for an inference that debris from previous days remained at the time of the accident or that the area was so strewn with debris to create a condition of danger.

12. In expressing grave doubts of the relevancy of the evidence received over respondent's objection concerning the slick, slippery and muddy condition and strewn debris existing in the yards and at the point of the accident days and weeks prior thereto.

13. In holding that under the evidence adduced at the trial of this cause that the cause of injuries to petitioner was left to speculation and conjecture.

14. In indirectly castigating petitioner and critizing the jury in stating there was ample and persuasive evidence from which the jury could have found that respondent violated the company rule prohibiting the use of intoxicating liquor and that it *could have found* that his injury solely resulted from such violation and his own conduct. This issue was settled by the jury's verdict in accordance with the Oregon

Supreme Court's opinion in the case of Natwick vs. Moyer, Vol. 41 Ore. Ad. Sheets No. 10, p. 347, 355; 163 Pac. (2d) 936.

15. In splitting up in its decision each charge of negligence into items mentioned in the complaint as constituent elements and making a ruling on each, contrary to the decisions of this Court in the case of Hadley vs. Union Pacific R. Co., 246 U.S. 330, 62 L. Ed. 751, wherein this Court held that "The whole (charge of negligence) may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon this point there can be no question * * *. We must look at this situation as a practical unit rather than inquire into a purely logical priority." and contrary to the decision in Blair vs. Baltimore & O. R. R. Co., 323 U.S. 600, 604; 89 L. Ed. 490, 494, which holds: "The negligence of the employer may be determined by viewing its conduct as a whole, Union P. R. Co. v. Hadley, 246 U.S. 330, 62 L. Ed. 571 * * * and especially is this true in a case such as this where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

16. In setting aside the verdict of the jury and judgment for petitioner and trying the cause *de novo* on the transcript of testimony, thereby substituting its judgment and decision for that of the jury in the face of the record that discloses substantial testimony of negligence proximately causing petitioner's injury, and

thereby depriving petitioner of his basic and fundamental right to trial by jury under the system of Federal jurisprudence and remedy afforded railroad employes under the Federal Employers' Liability Act and likewise his right to trial by jury under the 7th Amendment and equal protection of laws under the 14th Amendment of the Constitution of the United States.

17. In reversing the judgment of the Circuit Court and remanding the cause to that court with directions to enter judgment in favor of the defendant-respondent herein.

18. In not giving effect to the established rules and decisions of this Court which hold in effect that the jury having made an inference permissible under the evidence as to the cause of an employe's injuries in actions under the Federal Employers' Liability Act, evidence in support of a contrary inference is irrelevant on appeal, it being outside the function of the Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury, and the fact that the jury's verdict involved speculation and conjecture does not make it objectionable so long as it has basis in the evidence, the jury being free to discard or disbelieve whatever facts are inconsistent with its conclusion. The Supreme Court further erred in its action in not considering the testimony as a whole and in reciting in its opinion the evidence it deemed favorable to its subsequent findings of fact and conclusions thereon, and if its decision is permitted to stand will deprive this petitioner of his claim under the Federal law and his rights will be lost forever.

WHEREFORE your petitioner prays a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the Supreme Court of the State of Oregon commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket B. T. Waller, Respondent, vs. Northern Pacific Terminal Company of Oregon, Appellant, and that the judgment of the Supreme Court of the State of Oregon may be reversed by this Honorable Court and the judgment of the Circuit Court of the State of Oregon for Multnomah County affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just, and your petitioner will ever pray.

B. T. WALLER, Petitioner.

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Portland 4, Oregon.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In the "SUMMARY STATEMENT OF MATTER INVOLVED" in petition we have as briefly as possible referred to and digested the essential parts of the testimony upon which petitioner relies and therefore same will not be repeated here, but it is our position that such evidence received at the trial of this cause constituted substantial evidence to sustain one or more of the grounds of negligence charged against respondent that proximately caused in whole or in part the injuries to petitioner, namely, that where petitioner was required to work respondent negligently: (a) maintained a footpath in a slick, slippery and muddy condition; (b) caused or permitted debris and wooden sticks to be strung along and upon the ground area thereof used by petitioner in boarding moving cars; (c) failed to provide petitioner with reasonably safe footing and place of work; (d) neglected to warn petitioner prior to injury, of the dangerous condition of the ground area and footpath; and (e) failed to keep its premises and footpath in a clean condition as provided by its Rule 709: "Railroad premises must be kept in neat, *clean* and orderly condition." The evidence sustaining the foregoing grounds of negligence as detailed in the petition constitutes what the undisputed evidence shows or the facts found by the jury on the material issues.

The Oregon Supreme Court in its lengthy decision did not criticize in any particular the instructions to the jury (T. of T. 636-656), the procedure followed by the State Circuit Court in the trial of the cause, or find any other error claimed by respondent but reversed and dismissed the jury's findings and the lower court's decision on the broad ground of error claimed by respondent that there was no evidence of negligence proximately causing petitioner's injury, which assignment of error the court evidently interpreted to mean substantial evidence (R. p. 100) under the assumption that its members could try petitioner's cause in keeping with the provisions of the Federal Employers' Liability Act *de novo* on the trial court's transcript of testimony disputed and undisputed and determine questions of fact thereon as they viewed them, and base their conclusions of law and decision accordingly. In so doing it is submitted that the State Supreme Court's decision and judgment failed to give effect to petitioner's right to trial by jury as defined by this Court in a few of the cases later cited.

The Oregon Supreme Court in formulating its opinion failed to properly apply the test of "sufficiency of evidence" to that adduced on respondent's negligence in accordance with the decisions of this Court, in that the evidence of respondent's negligence was disputed by it and was conflicting on the facts on the material issues and such facts and the inferences arising therefrom were questions to be weighed

and determined by the jury as they were so determined.

The Oregon Supreme Court further failed to consider the entire testimony as a whole in its decision in quoting same but singled out certain portions thereof placed its interpretation thereon then found its decision accordingly rather than on the facts that the jury did find. The court in its decision paid no heed or attention to the entire testimony but glossed it over and made its determination as a jury and not as a reviewing court, contrary to the Federal decisions under the Federal Employers' Liability Act, a few of which are cited hereafter.

In the Supreme Court's opinion it stated in referring to testimony of petitioner: "The location of the 'sticks and blocks' which he had seen 'down in there' is left to speculation except for his statement, *supra,* that he stepped on what he believed to be a stick. Plaintiff gave no testimony concerning any debris at the point of the accident on the night in question." Petitioner at the time was testifying to the exact point of accident and no other as he had just been testifying about the stick he slipped on on cross-examination (T. of T. 252) and on redirect he was asked: "Q. Mr. Waller, you said you would call it a stick you slipped on. On what conclusion do you base that? A. Well, I had seen sticks down in there— Q. Pardon? A. I say, I had seen sticks and blocks down in there the day before, and some that night."

We submit the jury, trial judge and counsel who heard the witness' whole testimony and considered it that the only conclusion could be reached therefrom was that he was testifying to the point of the accident. The jury so understood it as evidenced by its verdict. It possibly was difficult for the Supreme Court to so understand it on the typewritten record. The opinion of the Supreme Court is replete with such interpretations as above and in using the expression "it is left to speculation" and "there is not a scintilla of evidence" in endeavoring to reason out its opinion. We have carefully read the decsions mentioned by the Supreme Court in its opinion. As the facts in the cases cited are not analogous to the facts in the case at bar they applied to the indiidual facts of each case and we do not believe apply to the abundance of testimony sustaining respondent's negligence in the case at bar.

SUMMARY

I.

The Oregon Supreme Court denied to petitioner his right to trial by jury, which is a basic and fundamental right under the system of Federal Jurisprudence and remedy afforded railroad employees under the Federal Employers Liability Act guaranteed by the 7th Amendment and equal protection under the 14th Amendment of the Constitution of the United States and so determined by:

Lavender, Admx. vs. Kurn, et al., Trustees of St. L.-S. F. Ry. Co., et al., Vol. 90 L. Ed. Ad. Op. No. 11 p. 692 (March 25, 1946).
Jacob vs. City of N. Y. ,315 U.S. 752; 86 L. Ed. 1166.
Tiller vs. Atlantic Coast R. Co., 318 U.S. 54; 87 L. Ed. 610.
Bailey vs. Central Vt. R. Co., 319 U.S. 350; 87 L. Ed. 1444.
Tennant vs. Peoria & Pekin Union R. Co., 321 U.S. 29; 88 L. Ed. 520.

II.

The Oregon Supreme Court erred in setting aside the verdict of the jury and judgment for petitioner entered thereon and trying the cause de vovo on the transcript of testimony and thereby substituting its judgment and decision for that of the jury, in the face of the record that discloses substantial testimony supporting negligence claimed by petitioner proximately causing his injury, the questions of fact thereon being solely issues for the jury to determine.

Lavender, Admx. vs. Kurn, et al, etc., Vol. 90, L. Ed. Ad. Op. No. 11 p. 692.
Tennant vs. Peoria & Pekin Union R. Co., 321 U.S. 29; 88 L. Ed. 520.
Bailey vs. Central Vt. R. Co., 319 U.S. 350; 87 L. Ed. 1444.
Tiller vs. Atlantic Coast R. Co., 318 U.S. 54; 87 L. Ed. 610.
N. Y. Central R. R. Co. vs. Marcone, 281 U.S. 345; 74 L. Ed. 892.

III.

The Supreme Court of Oregon failed to give effect to respondent's duty under the Federal Employers Liability Act to exercise reasonable care to provide petitioner with a safe place to work, the breach of which duty constitutes actionable negligence, such duty becoming more imperative as the risk increases, contrary to the following Federal decisions:

Lavender, Admx. vs. Kurn, et al., etc., Vol. 90 L. Ed. Ad. Op. No. 11 p. 692.
Blair vs. B. & O. R. R. Co., 323 U.S. 600; 89 L. Ed. 490.
Bailey vs. Central Vt. R. Co., 319 U.S. 350; 87 L. Ed. 1444.
Tiller vs. Atlantic Coast R. Co., 318 U.S. 54; 87 L. Ed. 610.
Kanawha & M. R. Co. vs. Kerse, 239 U.S. 576; 60 L. Ed. 448.
Baltimore & O. R. Co. vs. Whitacre, 242 U.S. 169; 61 L. Ed. 228.

IV.

The Oregon Supreme Court failed to give effect in its decision to the rule of law that it is not essential that evidence of negligence be direct and positive. Circumstantial evidence fairly susceptible of an inference or presumption tending to establish respondent's negligence is sufficient to support a recovery, contrary to the following decisions of this Court:

Lavender, Admx. vs. Kurn, et al., etc., Vol. 90 L. Ed. Ad. Op. No. 11 p. 692.
Tennant vs. Peoria & Pekin Union R. Co., 321 U.S. 29; 88 L. Ed. 520.
Tiller vs. Atlantic Coast R. Co., 318 U.S. 54; 87 L. Ed. 610.
N. Y. Central R. R. Co. vs. Marcone, 281 U.S. 345; 74 L. Ed. 892.

V.

The Oregon Supreme Court failed to give effect to respondent's company rule 709: "Railroad premises must be kept in neat, clean and orderly condition" and that the same furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence, contrary to the following Federal decisions:

Tennant vs. Peoria & Pekin Union R. R. Co., 321 U.S. 29; 88 L. Ed. 520.
Union Pac. R. R. Co. vs. Owens, Exec., 142 Fed. (2d) 145; Cer. denied, 323 U.S. 740; 89 L. Ed. 593.
Giltner vs. Baltimore & O. R. Co., 90 Fed. (2d) 635.
Wyatt vs. N. Y. O. & W. R. Co., 45 Fed. (2d) 705. Cer. denied 283 U.S. 829; 75 L. Ed. 1442.
Montgomery vs. Baltimore & O. R. Co., 22 Fed. (2d) 359.

VI.

The Oregon Supreme Court failed to give effect in its decision to the rule of law that proximate cause of an injury is ordinarily a question of fact for the jury to be determined in view of the circumstances of fact attending it and it is not a question of science or legal knowledge, as held by the following decisions:

Tennant vs. Peoria & Pekin Union R. Co., 321 U.S. 29; 88 L. Ed. 520.
Tiller vs. Atlantic Coast Line R. Co., 323 U.S. 574; 89 L. Ed. 465.
Dudley vs. Scandrett, et al., Trustees C. M. St. P. & P. R. R. Co., 115 Fed. (2d) 728.
Milwaukee & St. P. Ry. Co. vs. Kellogg, 94 U.S. 469; 24 L. Ed. 256.
Restatement Torts, Vol. 2, Sec. 43 (a).

VII.

The Oregon Supreme Court failed to give effect to the following adjudicated decisions of Federal and State Courts that obstructions on or close to the track constitutes actionable negligence:

Baltimore & O. R. Co. vs. Fletcher (CCA), 300 Fed. 318. Cer. denied 69 L. Ed. 468.
Berven vs. No. Pac. R. R. Co., 73 Fed. (2d) 687.
Cincinnati N. O. & O. T. P. Ry. Co. vs. Davis (CCA), 293 Fed. 481.
Lancaster vs. Fitch (Tex. App.) 239 S.W. 265 (S.C.) 246 S.W. 1015. Cer. denied, 67 L. Ed. 1216.
Gray vs. Davis (CCA), 294 Fed. 57.
Bird vs. St. L. & S. F. Ry. Co., 336 Mo. 316, 78 S.W. (2d) 389.

Adskim vs. O. W. R. & N., 129 Ore. 169, 276 Pac. 1094 (Its own opinion).

VIII.

The Oregon Supreme Court in its opinion totally failed to take into consideration the following decisions of the United States Supreme Court which hold in effect that the respondent should not be allowed to take apart the bundle of sticks of negligence and break them separately rather than to view them as a whole, and failed to consider all of the elements of negligence:

Blair vs. Baltimore & O. R. R. Co., 323 U.S. 600, 604; 89 L. Ed. 490, 491.
Hadley vs. U. P. R. R. Co., 246 U.S. 330; 62 L. Ed. 751.
Grand Trunk R. Co. vs. Lindsay, 201 Fed. 836.

IX.

The Supreme Court of Oregon was clearly in error when it stated that it was doubtful if evidence was admissible showing the condition of the premises with reference to sticks, debris, mud and water at or near the scene of accident days and even weeks prior to the time of injury to petitioner, as such evidence was clearly admissible for the following reasons:

Point 1. For the purpose of showing a continuous condition or a continuing course of negligent conduct and the dangerous character of the place.

Sec. 2-407 Sub. (33) O.C.L.A.
Saunders vs. Williams & Co., 155 Ore. 1, 7; 62 Pac. (2d) 260.
Bird vs. St. Louis & S. F. Ry. Co., 336 Mo. 316; 78 S.W. (2d) 389.

Point 2. For the purpose of showing that respondent knew or should have known within a reasonable time prior to the accident of the defective and unsafe condition of the place where petitioner was required to work.

45 C.J. p. 1248, par. 813.
Bird vs. St. Louis & S. F. Ry. Co., 336 Mo. 316; 78 S.W. (2d) 389.
Kelly vs. Raleigh Granite Co., 200 N.C. 326; 156 S.E. 517.
Lamb vs. Phila & R. Ry. Co., 66 A. 762; 217 Pa. 564.
Engen vs. Rambler Copper & Platinum Co., 121 Pac. 867; 20 Wyo. 95.
Hicks vs. Ocean Shore R. R., 117 Pac. (2d) 850 (Cal.) prior opinion 109 Pac. (2d) 1032.
Rush vs. Oregon Power Co., 51 Ore. 519, p. 525; 95 Pac. 193.

Point 3. For the purpose of showing the condition of the master's place of work where such condition is shown, or may have been presumed, to have continued up to the time of the accident or to show the dangerous character of the appliance or place or the employer's knowledge of the defect or danger.

39 C.J. p. 1015, par. 1231.
Boston Excelsior Co. vs. Sweatt, 229 Fed. 321.
Pritcheet vs. Southern Ry. Co., 157 N.C. 88; 72 S.E. 828.
Dean vs. Kansas City, St. L. & C. R. Co., 199 Mo. 386; 97 S.W. 910.

X.

The Oregon Supreme Court erred in stating the character and size of the object which petitioner testified he slipped on was left to speculation in that no one claimed to have seen it prior to or identified it after the accident although there is evidence of splinters being seen the next day near the rail at the approximate point of the accident, in that petitioner testified in boarding the box car where the ground area was slippery and muddy where there were sticks and debris strewn thereon, he stepped on one of the sticks with his left foot which slipped and rolled under his foot and was thereby caused to miss the foot-stirrup and swung backward between the moving cars and thrown down upon the track (T. of T. 34, 35, 178-185). Petitioner identified the stick as having felt the same roll under his foot. The Supreme Court's holding in this respect was contrary to the elementary rules of evidence and its own decisions as exemplified in:

Chamberlayne on Evidence, Vol. 3, Sec. 1737, p. 2278.

Saunders vs. Williams & Co., 155 Ore. 1, 10; 62 Pac. (2d) 260.

Briggs vs. John Yeon Co., 168 Ore. 239, 250; 122 Pac. (2d) 444.

F. W. Woolworth Co. vs. Brown, 258 Ky. 29; 79 S.W. (2d) 362.

Holt vs. Routt, et al., 48 S.W. (2d) 386.

Blake vs. Great Atlantic & Pac. T. Co., 266 Mass. 12; 164 N.E. 486, 487.

QUOTING FROM AUTHORITIES

Referring briefly to the case of *Jacob vs. City of N. Y.*, 86 L. Ed. 1166, wherein the *right to trial by jury* is defined (action under Jones Act—F.E.L.A.), this Court held on p. 1168:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence which is protected by the 7th Amendment. A right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

In *Tiller vs. Atlantic Coast R. Co.*, 87 L. Ed. 610 (action under F.E.L.A.) quoting from opinion p. 618:

> "No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co., 128 U.S. 443, 445, 32 L. Ed. 478, 479. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

The above cases on the right to trial by jury have been reaffirmed in Lavender, Admx. vs. Kurn, Bailey vs. Central Vt. and Tennant vs. Peoria, etc., *supra.*

In the recent decision of *Lavender, Admx. vs. Kurn, et al.*, 90 L. Ed. Ad. Op. No. 11 p. 692 (March 26, 1946) this Court in action under F.E.L.A. based solely on *circumstantial evidence* and *absence of eye witnesses* clearly defined the *quantum of evidence*, the frequently abused term of *"speculation and conjecture," function of the jury* and right of the appellate court as a *reviewing court* as follows:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 68, 87 L. Ed. 610, 617, 618, 63 S. Ct. 444, 143 ALR 967; Bailey v. Central Vermont R. Co., 319 U.S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 43 S. Ct. 1062; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 N.C.C.A. (N.S) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences,

a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

"We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central. The evidence was uncontradicted that it was very dark at the place where Haney was working and the surrounding ground was high and uneven. The evidence also showed that this area was entirely within the dominion and control of Illinois Central despite the fact that the area was technically located in a public street of the City of Memphis. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head."

In the case of *Blair vs. B. & O. R. R. Co.*, 89 L. Ed. 490 (action under F.E.L.A.), in passing on the question of a safe place to work, consideration of the evidence as a whole and the duty of the employer becoming more imperative as the risk increases, this Court held on p. 494:

"The evidence indicated that the immediate cause of the greasy pipe's slipping as it did was either (1), an uneven place on the warehouse floor due to its having sunken in; or (2) pushing the nose truck against the standing company truck with such force as to make the tube move with great suddenness. The fact that Fanno and Miller released their grips after it began to slip also contributed to the suddenness and force of the kickback of the nose truck which caused the petitioner's injury.

"We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes more imperative as the risk increases'. Bailey v. Central Vermont R. Co., 319 U.S. 350, 352, 353, 87 L. Ed. 1444, 1446, 1447, 63 S. Ct. 1062. See also Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 ALR 967. The negligence of the employer may be determined by viewing its conduct as a whole. Union P. R. Co. vs. Hadley, 246 U.S. 330, 332, 333, 62 L. Ed. 751, 754, 755, 38 S. Ct. 318. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

"The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length, on a 5 foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties—all of these raised questions

appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part.' Consequently we think the jury, and not the court should finally determine these issues."

In *Tiller vs. Atlantic Coast Line,* 87 L. Ed. 610 (action under F.E.L.A.) in passing upon the duty of an employer this Court held:

"In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment; 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business. Hough v. Texas & P. R. R. Co., 100 U.S. 213, 218, 25 L. Ed. 612, 615; cf. Northern P. R. Co. v. Herbert, 116 U.S. 642, 652, 29 L. Ed. 755, 760, 6 S. Ct. 590."

In *Tennant vs. Peoria & Pekin Union R. Co.,* 88 L. Ed. 520 (action under F.E.L.A.), in passing on the question of negligence claimed in violating company

rule No. 30 providing that engine bell must be rung when about to move, as evidence of negligence, on the question of proximate cause, quantum of evidence in absence of eye witnesses and limitation of the reviewing court to reweigh evidence this Court held on p. 523:

> "As to the proof of negligence the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung where an engine is about to move, it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. * * * There was ample, though conflicting, evidence that respondent's rule as well as the practice and custom, required the ringing of the engine bell in just such a situation. We cannot say, therefore, that the jury's concurrence in that view was unjustified. The court below erred however in holding there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was the proximate cause of Tennant's death. The absence of eye witnesses was not decisive. There was testimony that his duties included staying near the north or rear of the engine as it made its backward movement out of track B28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties * * *."

and on p. 525:

> "It is not the function of a court to search for the record for conflicting circumstantial evidence in order to take the case away from the jury on a

> theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U.S. 554, 34 L. Ed. 235, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line Co., supra (318 U.S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 ALR 967); Bailey v. Central Vt. R. Co., 319 U.S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.* (Italics ours.)

With reference to the admission of testimony on sticks, debris, mud and water at or near the scene of the accident within a reasonable time prior to the injury to petitioner, this evidence was clearly admissible for the reasons hereinbefore referred to.

Sec. 2-407 O.C.L.A. on disputable presumptions provides in Sub. (33):

> "That a thing once proved to exist continues as long as is usual with things of that nature."

45 C. J. p. 1248, Sec. 813:

> *"To Show Knowledge or Notice.* Where knowledge or notice of a danger or defect is in issue, evidence of * * * the doing of a particular act or the employment of a particular method or appliance on occasions prior to the one in question, or evidence of the existence of other defects * * * at a place near to the place of the accident or injury complained of or another portion of the same structure, is admissible to show that the person charged knew or should have known of the danger therein or thereat, provided the former * * * defects were of such nature or occurred or existed under such circumstances that he knew or should have known of them and that their * * * existence indicated the existence of the danger in question."

On the question of petitioner identifying the stick as having felt the same roll under his foot, the same was substantial evidence and clearly admissible.

Chamberlayne on Evidence, Vol. 3, Sec. 1737, p. 2278 states:

> "It should be observed that, in respect to admissibility, as distinguished from weight, no precedence is given to the results arrived at by the use of one of the senses when compared to those transmitted to the mind of another. There is no primary grade of sense impressions. Thus, the fact that witness *heard* a door close is quite as competent as though he saw it do so (citing State v. Baker, (Iowa, 1910) 126 N.W. 1120). (Emphasis author's.)

Referring to the *Blake case,* supra, in ruling on a like point the court states (quoting p. 52):

> "The defendant contends that it has been prejudiced in the admission of evidence. An eye-wit-

ness, who had described the fall and the condition of the floor was asked: 'Did you notice as you walked over it * * * either before the accident or afterward, what the effect on you was?' After objection and exception, he was allowed to answer: 'Yes'; and then was asked, without further exception, 'What was the effect on you?' The Judge asked, 'When?' The answer was: 'Before. The floor was slippery.' We see no error. The question, in substance was: 'What did you observe as you walked over it?' The answer: 'It was slippery,' is a statement of what he observed before the accident *from feeling rather than from sight.* It was not a matter of opinion but information gained from a physical sense. The evidence was competent."

In *Saunders vs. Williams & Co.,* 62 Pac. (2d) 260, the Oregon Supreme Court said:

It was not absolutely necessary for plaintiff to testify that she saw oil on the floor where she slipped. The fact that the witness testified it felt like oil is no reason for rejecting her statement of the fact that it was oil upon which she slipped. The testimony to which we have referred, and the circumstances delineated that the floor had been oiled and the worn and particular condition of the floor, warranted the jury in finding that the floor was in a slippery and hazardous condition at the place where plaintiff slipped."

In *Briggs vs. John Yeon Co.,* 122 Pac. (2d) 444, the Oregon Supreme Court held:

"She (plaintiff) testified that the part of the floor upon which she stepped at the time that she slipped felt like wax. That testimony constitutes evidence that the wet wax was the cause of her

fall. Haverty Furniture Co. v. Jewell, 38 Ga. App. 395, 144 S.E. 46.

"It is argued that the evidence is speculative because many persons had walked safely across the floor that morning before the plaintiff's accident, and it is said that it is just as probable that the accident was caused by a slippery substance carried into the office on the shoes of such persons. That other persons had used the floor without mishap is evidence in conflict with the truth of plaintiff's claim, and would warrant an inference that the floor was in a reasonably safe condition, but it would be for a jury to say whether it overcame the force of the sworn testimony on behalf of the plaintiff and the reasonable inferences therefrom. And, since there is no evidence that any dangerous substance was carried into the office on the shoes of any person, the court, were it to give heed to defendant's argument, would indulge in an unproved assumption and that would be to speculate instead of giving effect to the evidence."

It will be noted from the foregoing authorities that the Oregon Supreme Court rightfully found therein that evidence based upon the sense of feeling was competent and substantial, but in the case at bar it termed like evidence of petitioner when he stated that he could tell by the feel of the object he slipped upon that it was a stick, as speculative, which is in direct conflict with its former decisions.

CONCLUSION

Your petitioner has attempted to keep within the rules and limit this brief in all respects possible but it has been difficult in part so to do on account of the lengthy decision of the Oregon Supreme Court. Hearing upon the merits will of course disclose more fully the erroneous decision of the Oregon Supreme Court and the usurpation of its powers as a reviewing court. We believe we have shown that petitioner's constitutional rights have been violated and that the Oregon Supreme Court's opinion and judgment is in direct conflict with the decisions of U. S. Supreme Court and other Federal Circuit Courts on similar questions, and we earnestly urge upon this Court that petitioner's cause was properly submitted to the jury under appropriate instructions as to the law and that its verdict is conclusive on the questions involved.

The major injury sustained by petitioner was the loss of his right arm. That deprives him of earning his livelihood as a brakeman or switchman, an occupation he had followed most of his adult life. His age is such that this loss to him is of grave concern and we urge upon the Court that his rights under the Federal law and Constitution be preserved.

We therefore pray that the Court grant the writ that these rights may be protected.

Respectfully submitted,

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